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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1166

WENDELL CARTER,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

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Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second Judicial District

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Wendell Carter, prays that a writ of certiorari issue to review a judgment of the Appellate Court of Illinois, Second Judicial District, entered on March 28, 1969, affirming his conviction in the Circuit Court of the 17th Judicial Circuit, Winnebago County, Illinois, of the offense of aggravated kidnapping.

Citation to Opinion Below.

The opinion of the Appellate Court, printed in Appendix D hereto, infra, pages 9a-13a, is reported in 107 Ill. App. 2d 474, 246 N.E. 2d 320.

Jurisdiction.

The judgment of the Appellate Court was entered on March 28, 1969. A timely petition for appeal as a matter of right or in the alternative for leave to appeal to the Supreme Court of Illinois was filed on May 23, 1969. It was denied on September 25, 1969. A timely motion for reconsideration of the order denying the petition for appeal as a matter of right or in the alternative for leave to appeal was filed on October 10, 1969. It was denied on November 12, 1969. Thereupon, a mandate was issued.

The jurisdiction of this court is invoked under 28 U.S.C.A., Section 1257 (3).

The federal questions sought to be reviewed were raised in the trial court (e. g. motion to dismiss indictment) and also in the reviewing courts (e. g. brief, and petition for appeal as a matter of right or in the alternative for leave to appeal).

Questions Presented.

1. Whether the Illinois kidnaping statute is unconstitutional?

2. Whether the petitioner was deprived of his constitutional right to be informed of the nature and cause of the accusation?

3. Whether the trial court, in violation of the constitutional privilege of the defendant against self-incrimination, accepted his plea of guilty without first affirmatively determining that it had been made intelligently, knowingly and voluntarily?

4. Whether the procedure followed in the probation report and hearing deprived the petitioner of due process of law?

5. Whether the procedure followed at the hearing in aggravation and mitigation of the offense deprived the petitioner of due process of law?

6. Whether the punishment imposed indicates a lack of discretion by the trial court?

7. Whether the sentence is excessive and constitutes cruel and unusual punishment?

Constitutions, Statutes and Rules Involved.

The 5th, 6th, 8th and 14th Amendments to the Constitution of the United States and Sections 2, 9 and 10 of Article II of the Constitution of the State of Illinois are printed in Appendix A hereto, infra, pages 1a-2a.

Sections 10-1 and 10-2 of the Illinois Criminal Code of 1961, and Sections 111-3, 113-4, 115-2 and 117-1 of the Code of Criminal Procedure of 1963 are printed in Appendix B hereto, infra, pages 2a-5a.

Rules 401 and 615 of the Supreme Court of Illinois are printed in Appendix C hereto, infra, pages 6a-8a.

Statement of the Case.

This is a criminal prosecution.

Petitioner, Wendell Carter, hereinafter called defendant, was indicted with one Terry Belknapp, Bruce Allison and Ronald Bauer on November 10, 1967, by the grand jury of Winnebago County, in the State of Illinois, for the offenses of rape and aggravated kidnapping.

The indictment, consisting of two counts, is, as follows:

State of Illinois
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
County of Winnebago

The People of the State of Illinois

vs. No. 888

Terry Belknapp, Wendell Carter,
Bruce Allison and Ronald Bauer,
Defendants

Bill Of Indictment

The Grand Jury charges:

Count I.

That on the 22nd day of October, 1967, in the County of Winnebago and State of Illinois, one Terry Belknapp, one Wendell Carter, one Bruce Allison and one Ronald Bauer, male persons of the age of fourteen (14) years and upwards, committed the offense of rape, in that they had sexual intercourse with Louanne Paniuski, not their wife, by force and against her will, in violation of Paragraph 11-1, Chapter 38, Illinois Revised Statutes.

Count II.

That on the 22nd day of October, 1967, in the County of Winnebago and State of Illinois, one Terry Belknapp, one Wendell Carter, one Bruce Allison and one Ronald Bauer, committed the offense of Aggravated Kidnapping, in that they, knowingly by force, carried one Louanne Paniuski from one place to another with intent secretly to confine her against her will, and committed another felony upon Louanne Paniuski, to-wit: the offense of Rape, in violation of Paragraph 10-2 (3), Chapter 38, Illinois Revised Statutes.

A True Bill
Richard I. Boden
Foreman

Bail was set at $25,000.00 each.

Being arraigned in open court, each defendant was furnished with a copy of the indictment and lists of the witnesses and jurors on November 16, 1967.

The defendants entered their motions to dismiss the indictment which were heard and denied. They then entered pleas of not guilty. The case was set for trial on December 11, 1967.

On motion of defendants, their pleas of not guilty to the second count of the indictment were withdrawn on December 12, 1967.

The defendants entered pleas of guilty of aggravated kidnaping as charged in count two of the indictment. Each defendant filed his written waiver of trial by jury. The court accepted the pleas of guilty.

The defendants were adjudged guilty of aggravated kidnaping.

On motion, count one of the indictment was continued generally.

Leave was granted to the defendants to file petitions for release on probation.

The petitions for release on probation were filed on December 18, 1967.

The reports of the probation officer were filed on January 31, 1968.

The petitions were denied on February 16, 1968.

At the hearing in aggravation and mitigation, the defendants testified. Ronald Bauer was followed by Terry Belknapp, Bruce Allison and Wendell Carter.

Paul Pirrello, a probation officer, testified for the State.

At the conclusion thereof, the defendants were sentenced to the Illinois State Penitentiary for a term of not less than 10 years nor more than 25 years.

On motion of the State's Attorney, count one of the indictment was nolle prossed as to each of the defendants.

A notice of appeal was filed by the defendant, Wendell Carter, on March 15, 1968.

From the judgment of conviction and sentence, the defendant appealed to the Appellate Court of Illinois, Second Judicial District.

The judgment of the trial court was affirmed on March 28, 1969.

He then made application to the Supreme Court of Illinois for appeal as a matter of right or in the alternative for leave to appeal.

Facts.

In the order named, Ronald Bauer, Terry Belknapp, Bruce Allison and Wendell Carter, testified at the hearing in aggravation and mitigation.

They related their part in the incident. During the day of October 22, 1967, all had been drinking varying amounts of beer and whiskey. (A. 27, 30, 34, 36.) Ronald Bauer met Terry Belknapp and another boy in a recreation center. After they had some liquor, they went to a bar on 7th Street to drink some more. (A. 27.) When it closed they left and were driving up West State Street in Rockford in Belknapp's car. (A. 27, 30.) A car came up behind them and Bauer started a conversation with the two women. (A. 27.) Bauer asked them if they wanted to go to a party and they said yes. He and another fellow who was out on bond for being an accessory got in the girl's car and they rode around for 15 or 20 minutes and had a few drinks. (A. 27, 31.) Belknapp followed them in his car. (A. 31.) The girls wanted a party so they took them to Belknapp's apartment. (A. 27, 31.) There was drinking in the apartment. (A. 28, 31.) At first Bauer and another fellow accompanied the girls to the apartment. (A. 28.) A short time later Belknapp and another fellow arrived, and while Belknapp was using the phone two boys left. (A. 31.) In a short time the two boys returned with two others, Allison and Carter. The girls decided that there were too many fellows there so they left. (A. 31, 35.)

Bauer helped place the girl in Belknapp's car. (A. 28.) Allison and Belknapp were in the car when the girl was placed in it (A. 34), but Carter did not arrive at the

car until the girl was already in it. (A. 35.) The girl was taken into the country where the acts were committed. (A. 28, 31, 34, 35.) Belknapp and Carter had sexual intercourse with the girl. (A. 31, 36.) Allison denied that he had intercourse with the girl (A. 34) as did Bauer, although his testimony apparently conflicted. (A. 29.) After leaving the scene, they returned to pick up her shoes. (A. 29, 32.) They were arrested when they returned to the parking lot to change cars. (A. 27.) At no time was there any conversation about doing bodily harm to the girl. (A. 30, 32, 34, 36.)

Ronald Bauer was 21, and attended Lincoln Junior High School through the 8th grade. (A. 27.) He was employed at the time of his arrest and was on probation for armed robbery. (A. 17.)

Terry Lee Belknapp was 19, and had quit school. (A. 30.) At the time of his arrest, he was working for Elco Tool & Screw Company. In 1966, he was arrested for burglary but the charge was reduced to petty theft. He served 78 days. He had no other criminal record. He realized that he had a debt to pay to society, but he desired to rehabilitate himself in the penitentiary. (A. 32.) He wanted more education and felt that he could benefit society. He made a statement to the police but he was under the influence of liquor at the time. (A. 33.)

Bruce Allison was 19, and had completed a semester in the 11th grade. (A. 33.) He was employed at the time of his arrest. He had no criminal record except misdemeanors. He stated that each was a different individual and the rehabilitation tendencies of each should be taken into consideration in sentencing. (A. 34.)

Wendell George Carter was 20, and had gone through his sophomore year at Boylan High School (A. 35.) He had been employed after leaving school. He had no prior felony record, but had been arrested on 7 occasions for minor drinking, disorderly conduct and fleeing to avoid arrest. He wasn't present when the girls were picked up. He arrived at the apartment with Bruce Allison and five fellows and a couple of girls were there. The girls decided that there were too many fellows there so they left. When he came from the apartment, the girl was already in the car. She was taken to the country against her wishes. During the day he had a couple of six packs and a pint and a half of whiskey. (A. 36.) There never was any conversation to do bodily violence to the girl. It was their intent to bring her home. He was sorry for what he did and wished the court to be merciful in sentencing so that he could be rehabilitated the best he could. His parents were in the courtroom and had visited him in the jail. He was given an intoxication test at the police department, but he was not informed of the result.

The Probation Officer, Paul Pirrello, who was a Captain in the Rockford Police Department at the time of the arrest, was asked by the State's Attorney whether the boys were intoxicated. (A. 37.) He stated that in his opinion they had been drinking but were not intoxicated. He ordered a test made of Carter because he showed the most evidence of drinking, but he could not remember what the test showed. (A. 37.)

At the conclusion of the hearing, Wendell Carter and the other defendants were sentenced to the Illinois State Penitentiary for a term of not less than 10 years nor more than 25 years.

Reasons for Granting the Writ.

1. The Illinois kidnapping statute is unconstitutional.

The Constitution of the United States provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny the equal protection of the laws. U.S. Const. Amend. 14.

The Constitution of the State of Illinois has a similar provision. Ill. Const. 1870, Art. II, Sec. 2.

The statute which created the offense is, as follows:

"Section 10-1. Kidnaping.) (a) Kidnaping occurs when a person knowingly:

(1) And secretly confines another against his will, or

(2) By force or threat of imminent force carries another from one place to another with intent secretly to confine him against his will, or

(3) By deceit or enticement induces another to go from one place to another with intent secretly to confine him against his will.

(b) Confinement of a child under the age of 13 years is against his will within the meaning of this Section if such confinement is without the consent of his parent or legal guardian.

(c) Penalty.

A person convicted of kidnaping shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years.

Section 10-2 Aggravated Kidnaping.) (a) A kidnaper within the definition of Section 10-1 (a) is

guilty of the offense of aggravated kidnaping when he:

(1) Kidnaps for the purpose of obtaining ransom, money, benefit, or other valuable thing or concession from the person, or from any other person; or

(2) Takes as his victim a child under the age of 13 years, or

(3) Inflicts great bodily harm or commits another felony upon his victim, or

(4) Wears a hood, robe or mask or conceals his identity.

(b) Penalty.

(1) A person convicted of aggravated kidnaping for ransom shall be punished by death or imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 2 years. If the accused is found guilty by a jury, a sentence of death shall not be imposed by the court unless the jury's verdict so provides in accordance with Section 1-7 (c) (1) of this Code.

(2) A person convicted of aggravated kidnaping other than for ransom shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than 2 years. As amended by act approved Sept. 1, 1967. L. 1967, p. ...., H.B. No. 1648."

Ill. Rev. Stat. 1967, Chap. 38, Pars. 10-1, 10-2.

In *People* v. *Daniels,* 80 Cal. Rptr. 897, 71 A.C. 1165, 459 P. 2d 225, which was decided on October 2, 1969, the Supreme Court of California discussed the California and New York kidnapping statutes. In the opinion, the court said:

"Until 1965, New York followed the rule that virtually any confinement or movement of the victim constituted kidnaping, even when it was undertaken

solely to facilitate commission of another crime. A typical example was *People* v. *Florio* (1950) 301 N.Y. 46, 92 N.E. 2d 881, 17 A.L.R. 2d 993, in which the defendants, pursuant to a prearranged plan to satisfy their sexual desires, lured a young woman into their automobile and drove from Manhattan to an isolated place in Queens, where they raped her. The defendants were convicted of kidnaping as well as assault and rape, and the New York Court of Appeals affirmed. While conceding that 'the detention inevitably occurring during the immediate act of commission of such a crime as rape or robbery would not form a basis for a separate crime of kidnapping,' the court held that such a separate crime had been committed in the circumstances of that case. (Id. at p. 882.) In so doing, the court relied on two earlier New York cases in which the victim had been confined in an automobile 'for a short time' and for 'less than two minutes.' (Id. at pp. 882-883.)

In the landmark decision of *People* v. *Levy* (1965) 15 N.Y. 2d 159, 256 N.Y.S. 2d 793, 204 N.E. 2d 842, however, the Court of Appeals rejected its earlier construction of the kidnaping law. There the defendants accosted a husband and wife as they pulled up in front of their house and forced them at gunpoint back into their car; one defendant drove the vehicle aimlessly for 27 blocks, consuming 20 minutes of time, while the other robbed the victims of their jewelry and wallet. The defendants were convicted of kidnaping as well as first degree robbery and possession of a pistol. The Court of Appeals reversed the judgments on the kidnaping counts and directed dismissal of those counts as a matter of law.

The court recognized that 'Kidnapping is, by contemporary statutory standards, one of the most serious crimes. In our era this crime has assumed par-

ticularly reprehensible forms.' (256 N.Y.S. 2d at p. 795, 204 N.E. 2d at p. 843.) But the court then turned to fundamentals, observing that 'In basic concept the crime of kidnapping envisages the asportation of a person under restraint and compulsion. Usually the complete control of the person and the secrecy of his location are means of facilitating extortion.' (Id. 256 N.Y.S. 2d at p. 795, 204 N.E. 2d at pp. 843-844.) Noting the breadth of the statutory definition of kidnaping, the court reasoned that it 'could literally overrun several other crimes, notably robbery and rape, and in some circumstances assault, since detention and sometimes confinement, against the will of the victim, frequently accompany these crimes. Some of the definitions could apply alike to kidnapping and abduction. *It is a common occurrence in robbery, for example, that the victim be confined briefly at gunpoint or bound and detained, or moved into and left in another room or place.*

'It is unlikely that these restraints, sometimes accompanied by asportation, *which are incidents to other crimes* and have long been treated as integral parts of other crimes, were intended by the Legislature in framing its broad definition of kidnapping to constitute a separate crime of kidnapping, even though kidnapping might sometimes be spelled out literally from the statutory words.' (Italics added.) (Id. 256 N.Y.S. 2d at p. 796, 204 N.E. 2d at p. 844.)

The court then overruled Florio, and expressly 'limit(ed) the application of the kidnapping statute to 'kidnapping' in the conventional sense in which that term has now come to have acquired meaning.' (Ibid.)

Although recognizing there may be situations in which 'actual kidnapping in this sense' can be established even though the detention or movement is un-

dertaken to facilitate commission of another crime,[9] the court explained that 'In the case before us the movement of the automobile, which was itself the situs of the robbery, was not essentially different in relation to the robbery than would be the tying up of a victim in a bank and *his movement into another room*. In essence the crime remained a robbery although some of the kidnapping statutory language might literally also apply to it.' (Italics added.)

Finally, the court noted the unanimous support of its position expressed by the legal commentators and scholars: 'This separation of essentially separate crimes is consistent with the general trend of professional comment and analysis of kidnapping statutes which could be read to include acts which are integral to other crimes and are not essentially kidnapping. (See, e. g., A Rationale of the Law of Kidnapping, 53 Col. L. Rev. 540, n. 20; Judicial Construction of Kidnapping Statutes, 15 Albany L. Rev. 65; Room-to-Room Movement: A Risk Rationale for Aggravated Kidnaping, 11 Stan. L. Rev. 554; Kidnaping and the Element of Asportation, Note 35 So. Calif. L. Rev. 212; Note 110 U. Pa. L. Rev. 293.)' (Id. 256 N.Y.S. 2d at p. 797., 204 N.E. 2d at p. 845.)

The case before us involves movement of the victims with the intent to commit both robbery and rape.

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[9] The opinion cites as an illustration *People* v. *Black* (1962) 18 A.D. 2d 719, 236 N.Y.S. 2d 240, in which one of the victims of a robbery was transported as a hostage to another state and held for some time after the robbery was completed. A more recent example is *People* v. *Miles*, (1969) 23 N.Y. 2d 527, 297 N.Y.S. 2d 913, 245 N.E. 2d 688, in which the New York Court of Appeals declined to apply the *Levy* rule to defendants who attempted to murder their victim in New Jersey, tied him up and threw him into the trunk of an automobile, drove for several hours in various directions looking for a place to finish killing him and dispose of his body, and finally crossed the state line into New York, where the arrest took place.

Levy was a kidnap-robbery case; two years later a kidnap-rape case similar to *Florio* arose in *People* v. *Lombardi* (1967) 20 N.Y. 2d 266, 282 N.Y.S. 2d 519, 229 N.E. 2d 206, and the New York Court of Appeals did not hesitate to apply the *Levy* rule again. The defendant in *Lombardi,* a pharmacist, tricked three young women into taking barbiturates which impaired their will and ability to resist, then drove them from Manhattan to a hotel in Queens, where he sexually assaulted them. On these facts he was convicted of kidnaping as well as assault and attempted rape.

The Court of Appeals recognized that 'The asportation of the three young women from Manhattan to Queens, aided in part, at least, by the drug, and the physical domination of them in a motel made possible by the drug, comes literally within the terms of kidnapping statute.' (Id. 282 N.Y.S. 2d at p. 521, 229 N.E. 2d at p. 208.) But the court observed (ibid.) that 'the direction of the criminal law has been to limit the scope of the kidnapping statute, with its very substantially more sever penal consequences, to true kidnapping situations and not to apply it to crimes which are essentially robbery, rape or assault and in which some confinement or asportation *occurs as a subsidiary incident.*' (Italics added.) Stating that in the case before it asportation 'played no significant role in the crimes,' the court held *Levy* to be controlling and reversed with directions to dismiss the kidnaping counts.[10]

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[10] Other New York decisions applying *Levy* are *People* v. *King* (1966) 26 A.D. 2d 832, 273 N.Y.S. 2d 925 (kidnaping incident to rape and robbery), and *People* v. *Hatch* (App. Div. 1966) 25 A.D. 2d 606, 267 N.Y.S. 2d 651 (kidnaping incident to rape). The New York Court of Appeals has since undertaken to explain the *Levy-Lombardi* rule in *People* v. *Miles* (1969) supra, 297 N.Y.S. 2d 913, 922, 245 N.E. 2d 688, 694-695; much of the explanation is less than

Finally, the spirit animating these judicial developments in the law of kidnapping has also manifested itself in new legislative proposals and enactments, Section 212.1 of the Model Penal Code, adopted by the American Law Institute in 1962, provides that 'A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a *substantial* distance from the vicinity where he is found, or if he unlawfully confines another for a *substantial* period in a place of isolation,' for the purpose, inter alia, of terrorizing or holding the victim for ransom, or of facilitating the commission of a felony. (Italics added.)

The learned draftsmen of the Model Code explain that 'it is desirable to restrict the scope of kidnapping, as an alternative or cumulative treatment of behavior whose chief significance is robbery or rape, because the broad scope of this overlapping offense has given rise to serious injustice, as well as to distortion of criminal statistics. Examples of abusive prosecution for kidnapping are common. Among the worst is use of this means to secure a death sentence or life imprisonment for behavior that amounts in substance to robbery or rape, in a jurisdiction where these offenses are not subject to such penalties (citing *Tanner, Knowles, Chessman,* and *Wein*). The criminologically nonsignificant circumstances that the victim was detained or moved *incident to* the crime

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clear, but the court does conclude that the rule 'was designed to prevent gross distortion of lesser crimes into a much more serious crime by excess of prosecutorial zeal.' Courts of other jurisdictions have also warned prosecutors against abusing kidnaping statutes in this manner. (See, e.g., *State* v. *Morris* (1968) 281 Minn. 119, 160 N.W. 2d 715, 718; *State* v. *Johnson* (1961) 67 N.J. Super. 414, 170 A. 2d 830, 835.)

determines whether the offender lives or dies.' (Italics added) Comments to Sec. 212.1 (Tent. Draft No. 11, 1960), pp. 13-14.)

Turning to their proposed formulation, the draftsmen point out (at p. 16) that it first defines kidnaping in terms of removing the victim from his customary place of abode or work: 'This eliminates the absurdity of prosecuting for kidnapping in cases where the victim is forced into his own home to open the safe, or to the back of his store in the course of a robbery. For situations where the victim is seized elsewhere than in his residence or place of business, the section requires removal 'a substantial distance from the vicinity' of seizure. By using the word 'vicinity' rather than 'place' and by requiring substantial removal, the section makes clear the purpose to preclude kidnapping convictions based on trivial changes of location having no bearing on the evil at hand.'[11] The Model Penal Code definition of kidnaping was adopted in virtually identical terms by the draftsmen of the recent revision of the New York criminal code. (Proposed New York Penal Law (1946), Sec. 140.15).[12] The New York Legislature

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[11] The draftsmen note, however, that in California a similar purpose can be achieved by statutory construction. Pointing out that Penal Code, section 207 defines kidnaping as forcible movement of the victim, inter alia, 'into another part of the same county,' the draftsmen conclude that 'a court could be justified in reading into this phrase some requirement of substantial displacement' (id. at p. 12 n. 7).

[12] Writing a year before *Levy* was decided, these draftsmen condemned the pre-existing New York statute as 'inordinately broad, encompassing, for example, ordinary robberies and rapes in the course of which the victim happens to be moved a few feet from one room to another' (id. at pp. 344-345).

ultimately enacted a somewhat more complicated statutory scheme (N.Y. Penal Law, McKinney's Consol. Laws, c. 40, art. 135 (eff. Sept. 1, 1967)), but preserved the Model Code requirement that the asportation be 'substantial.'[13] Commenting on the new statute in *Lombardi,* the Court of Appeals explained (at p. 522 at 282 N.Y.S. 2d at p. 209 of 229 N.E. 2d) that 'The Legislature has undertaken to bring more certainty than the court was able to achieve in *Levy* to the problem of when confinement and restraint are significant enough by themselves to warrant a kidnapping prosecution.' Similar legislative undertakings to provide 'more certainty' and detail than is ordinarily appropriate in an appellate opinion are not unknown in California. (Compare *Muskopf* v. *Corning Hospital Dist.* (1961) supra, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457, with the 1963 sovereign immunity legislation (Stats. 1963, ch. 1681).)

For the reasons stated, the rule of construction declared in *People* v. *Chessman* (1951) supra, 38 Cal. 2d 166, 192, 238 P. 2d 1001, 1017, i. e., that 'It is the fact, not the distance, of forcible removal which constitutes kidnaping in this state,' is no longer to be followed. Rather, we hold that the intent of the Legislature in amending Penal Code, section 209 in 1951 was to exclude from its reach not only 'standstill' robberies (e. g., *People* v. *Knowles* (1950) supra, 35

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[13] Thus in New York a person is guilty of simple kidnaping when he 'abducts' another person (sec. 135.20); to 'abduct' means to 'restrain' by concealment or force (Sec. 135.00, subd. 2); and to 'restrain' means to restrict a person's movements 'in such manner as to interfere *substantially* with his liberty' (italics added; Sec. 135.00, subd. 1). A person is guilty of aggravated kidnaping when he thus 'abducts' another person and when (1) his intent is to demand ransom, or (2) he restrains the victim for more than 12 hours with intent to terrorize the victim or to facilitate the commission of a felony (sec. 135.25).

Cal. 2d 175, 217 P. 2d 1) but also those in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself. (See Note, Room-to-Room Movement: A Risk Rationale for Aggravated Kidnaping (1959) 11 Stan. L. Rev. 554, 555; Note, A Rationale of the law of Kidnapping (1953) Colum. L. Rev. 540, 554-557.) 'This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.' (*Rector, etc., of Holy Trinity Church* v. *United States* (1892) 143 U.S. 457, 459 12 S. Ct. 511, 512, 36 L. Ed. 226.)

Applying this rule to the facts at hand, we conclude that the brief movements which defendants Daniels and Simmons compelled their victims to perform in furtherance of robbery were merely incidental to that crime and did not substantially increase the risk of harm otherwise present. Indeed, when in the course of a robbery a defendant does no more than move his victim around inside the premises in which he finds him—whether it be a residence, as here, or a place of business or other enclosure—his conduct generally will not be deemed to constitute the offense proscribed by section 209. Movement across a room or from one room to another, in short, cannot reasonably be found to be asportation 'into another party of the same county.' (Pen. Code, Sec. 207.) Accordingly, the judgments on counts II, III, and IV must be reversed and

People v. *Wein* (1958) supra, 50 Cal. 2d 383, 326 P. 2d 457, must be, and is, overruled insofar as it is inconsistent with the views herein expressed.[14]"

It is submitted that *People* v. *Green,* 368 Ill. 242 (1938) answers the constitutional question raised here. In *Green* at page 245, the court said:

> "In creating an offense by statute which was not a crime at common law such statute must be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty. (16 Corpus Juris 67.) If the law is of such doubtful construction and described the act denominated as a crime in terms so general and indeterminate as to make the question of criminality dependent upon the opinions of the individuals who happen to constitute the court and the jury, and of such a nature that honest and intelligent men are unable to ascertain what particular act is condemned by the State, the law is incapable of enforcement and will be held null and void."

The court below should have followed it.

If a statute does not give fair warning of the conduct which it makes criminal, then it is unconstitutional because it denies due process of law.

The applicable rule was well stated by this court in *Wright* v. *Georgia,* 378 U.S. 284, 83 S. Ct. 1240, 10 L. ed. 2d 349 (1963).

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[14] Because the relevant facts of *Wein* were identical to those of the case at bar, its application of section 209 falls with the reversal we order here. We do not, however, decide whether the rule we now enunciate would have required reversal of kidnaping convictions in cases presenting different facts, such as *Chessman* or any other matter now final. Our task is to decide the case before us, and, if necessary and appropriate, to provide guidelines for future application of the kidnaping statute.

At page 1246, 83 S. Ct. 1240, the court said:

> "* * * It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process. *Lanzetta* v. *New Jersey,* 306 U.S. 451, 59 S. Ct. 618, 83 L. ed. 888; *Connally* v. *General Construction Co.,* 269 U.S. 385, 46 S. Ct. 126, 70 L. ed. 322; *United States* v. *L. Cohen Grocery Co.,* 255 U.S. 81, 41 S. Ct. 298, 65 L. ed. 516; see also *United States* v. *National Dairy Products Corp.,* 372 U.S. 29, 83 S. Ct. 594, 9 L. ed. 2d 561."

The instant case provides a clear example how widely this vague statute may be applied. It is indeed difficult to defend against such a statute.

The statute is vague, indefinite and uncertain. It is clear that the judgment cannot stand. The court should strike down the conviction because there was a denial of due process of law.

2. The petitioner was deprived of his constitutional right to be informed of the nature and cause of the accusation.

An intelligent and full understanding by the accused of the accusation against him is the first requirement of due process of law. To afford due process of law an indictment must fairly inform him of the charge against him and contain a statement of the acts which constitute the offense with reasonable definiteness and certainty, so as to advise the accused what he has to meet and give him a fair and reasonable opportunity to prepare his defense and enable him to plead the judgment is bar of a subsequent prosecution for the same offense. *People* v. *Peters,* 10 Ill. 2d 577 (1957).

The indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. Fed. Rules of Crim. Proc. Rule 7 (c), 18 U.S.C.A. The Illinois statute requires that the charge shall state an offense. Ill. Rev. Stat. 1967, Chap. 38, Sec. 111-3.

Notwithstanding these provisions, the courts below repeatedly have held that a charge in an indictment, even though in the language of the statute creating the offense, is not sufficiently specific and definite unless the statute, in creating the offense, specifically defines or describes the act or acts constituting the offense, so that the charge may be easily understood.

Generally, it is sufficient in an indictment to state the offense in the language of the statute in those cases where the statute clearly defines or describes the offense. *Gallagher* v. *People*, 211 Ill. 158 (1904), *Brennan* v. *People*, 113 Ill. App. 361 (1904). Where the statute, however, does not define or describe the act or acts constituting the offense, such acts must be specifically alleged. *People* v. *Peters*, 10 Ill. 2d 577 (1957), *People* v. *Potter*, 5 Ill. 2d 365 (1955), *People* v. *Chiafreddo*, 381 Ill. 214 (1942), *People* v. *Green*, 368 Ill. 242 (1938), *People* v. *Brown*, 336 Ill. 257 (1929).

Clearly, it is not sufficient to allege the offense of aggravated kidnapping in the language of the statute.

While an offense may be set forth in a statute with sufficient definiteness and certainty to satisfy constitutional requirements, it does not follow that an indictment in the language of the statute is sufficient to inform the accused of the nature and cause of the accusation, or to

state an offense punishable under the statute, as required by the Constitution. Rather, where the statute does not define or describe the act or acts constituting the offense created, they must be specifically alleged. Fed. Rules of Crim. Proc. Rule 7 (c), 18 U.S.C.A., Ill. Rev. Stat. 1967, Chap. 38, Sec. 111-3.

Here, the petitioner was indicted with one Terry Belknapp, Bruce Allison and Ronald Bauer on November 10, 1967, by the grand jury of Winnebago County, in the State of Illinois, for the offense of rape and aggravated kidnaping. As heretofore stated, the petitioner entered a plea of guilty to Count II of the indictment which charged the offense of aggravated kidnaping. The plea was accepted. Count I which charged the offense of rape was nolle prossed.

Count II attempted to charge the offense of aggravated kidnaping in the language of the statute. See Section 10-2 (a) (3) of the Criminal Code of 1961. (Ill. Rev. Stat. 1967, Chap. 38, Par. 10-2 (a) (3).) Aggravated kidnaping, as the name implies, is a form of kidnaping and conviction results in the increased penalty. The statute provides that a person convicted of aggravated kidnaping shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than 2 years (Ill. Rev. Stat. 1967, Chap. 38, Par. 10-2 (b) (2)), whereas a person convicted of kidnaping shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years (Ill. Rev. Stat. 1967, Chap. 38, Par. 10-1 (c)).

The grand jury attempted to charge the offense in substantially the language of the statute (Ill. Rev. Stat. 1967,

Chap. 38, Par. 10-1 (a) (2), and by adding part of the language of Par. 10-2 (a) (3). In referring to Section 10-1 (a) (2) the charge did not set forth the nature of the force, or the place from and to which the person was carried.

Here, the movement of the person from one place to another was merely incidental to the commission of the offense of rape and did not substantially increase the risk of harm otherwise present. *People* v. *Daniels,* 80 Cal. Rptr. 897, 71 A.C. 1165, 459 P. 2d 225 (1969). To carry a person from one place to another with intent secretly to confine him against his will cannot reasonably be found to be kidnaping.

In addition, it did not allege the infliction of great bodily harm, but the attempt to allege the commission of "another felony" resulted in the following:

> "and committed another felony upon Louanne Paniuski to-wit: the offense of Rape, in violation of Paragraph 10-2 (3), Chapter 38, Illinois Revised Statutes."

The use of the word "Rape" is a conclusion of the pleader, and the nature and elements of the offense are not set forth. Ill. Rev. Stat. 1967, Chap. 38, Sec. 11-1. Furthermore, an accused is not expected to know the nature and elements of the offense.

No cases have been found which are precisely in point relative to the sufficiency of the indictment, except the cases which state the general rule such as *People* v. *Peters,* 10 Ill. 2d 577 (1957), and *People* v. *Green,* 368 Ill. 242 (1938), but the attention of this Court is directed to *People* v. *Long,* 39 Ill. 2d 40 (1968), and *People* v. *Bishop,* 1 Ill. 2d 60 (1953), which approach the subject, but do not answer the question raised here.

The indictment is vague, indefinite and uncertain. It is absolutely void. It is reversible error.

Again, there was a denial of due process of law.

3. The trial court, in violation of the constitutional privilege of the defendant against self-incrimination, accepted his plea of guilty without first affirmatively determining that it had been made intelligently, knowingly and voluntarily.

This case involves the procedure that must be followed before a court may accept a plea of guilty.

The procedure is set forth in the Code of Criminal Procedure of 1963. (Ill. Rev. Stat. 1967, Chap. 38, Secs. 113-4, 115-2.) It is, as follows:

> "Section 113-4. Plea.) (a) When called upon to plead at arraignment the defendant shall be furnished with a copy of the charge and shall plead guilty or not guilty.
>
> (b) If the defendant stands mute a plea of not guilty shall be entered for him and the trial shall proceed on such plea.
>
> (c) If the defendant pleads guilty such plea shall not be accepted until the court shall have fully explained to the defendant the consequences of such plea and the maximum penalty provided by law for the offense which may be imposed by the court. After such explanation if the defendant understandingly persists in his plea it shall be accepted by the court and recorded.
>
> Section 115-2. Pleas of Guilty.) (a) Before or during trial a plea of guilty may be accepted when:
>
> (1) The defendant enters a plea of guilty in open court;

(2) The court has informed the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea.

(b) Upon acceptance of a plea of guilty the court may hear evidence of the charge."

The statute is implemented by Supreme Court Rule 401. (Ill. Rev. Stat. 1967, Chap. 110A, Sec. 401.) It is, as follows:

"(a) Waiver of Indictment. When an offense that under the constitution of this State must be prosecuted by indictment is prosecuted by information or complaint rather than indictment, the state may file an information or complaint with the clerk of the court. Thereafter the accused shall be brought into open court. After he has been advised of the nature of the charge and of his rights as hereinafter set forth, if he in open court waives prosecution by indictment, proceedings shall follow in accordance with the statutory requirements of proceedings under an indictment. If the accused does not waive prosecution by indictment, the court shall order the information or complaint stricken without prejudice to the right of the state to proceed by indictment.

(b) Procedure on Plea or Waiver. The court shall not permit a plea of guilty or a waiver of indictment or of counsel by any person accused of a crime for which, upon conviction, the punishment may be imprisonment in the penitentiary, unless the court finds from proceedings had in open court at the time waiver is sought to be made or plea of guilty entered, or both, as the case may be, that the accused understands he has a right to be held to answer for the offense on indictment by a grand jury and has understandingly waived that right and consented to his prosecution by information, that he understands the nature of the charge against him, and the consequences thereof if found guilty, and understands he

has a right to counsel, and understandingly waives that right. The inquiries of the court, and the answers of the accused to determine whether he understands his rights to be indicted by a grand jury and to be represented by counsel and comprehends the nature of the crime with which he is charged and the punishment thereof fixed by law shall be taken and transcribed and filed in the case. The transcript, when filed, becomes a part of the common-law record in the case."

The relevant part of the proceedings at the plea of guilty is, as follows:

"Mr. Nicolosi: Your Honor, the defendants wish to plead to the second count of the indictment.

The Court: Aggravated kidnapping?

Mr. Nicolosi: Yes.

The Court: I will address my remarks to the four of you. Before I accept your plea of guilty, it is the Court's duty to inform you that you have a right to trial by jury of twelve people selected from the County, the right to have all the witnesses who testify against you appear in your presence in open Court and testify, the right to put on whatever defense you might have, and finally the right to have a jury pass upon your guilt or innocence.

Where you enter a plea of guilty, you waive your right to trial by jury, and the matter is then left up to the Judge alone. And on your plea of guilty the Court might sentence you to the penitentiary for a period of years not less than one or a maximum number of years to be fixed by the Court, or any combination of years not less than the minimum set by the court and the maximum set by the Court,

within the one to the indeterminate number of years fixed by the Court.

* * *

Who is Wendell Carter?

Defendant Carter: I am.

The Court: Do you understand what the Court has said?

Defendant Carter: Yes.

The Court: Is there anything about it you don't understand?

Defendant Carter: No, sir.

The Court: How old are you?

Defendant Carter: Twenty.

The Court: Let the record show that the defendant, Wendell Carter, has been advised of his rights and the consequences of his plea of guilty. He persists in his plea of guilty. The Court accepts his plea of guilty to the second count of the indictment." (A. 8.)

The Court should have read and explained the charge to him before he was required to plead and made certain that he understood the nature of the charge against him. It can not be presumed that his counsel explained the same. It is the duty of the Court to see that the charge and penalty are explained and understood. *People* v. *Terry*, 44 Ill. 2d 38; *People* v. *Ballheimer*, 37 Ill. 2d 24; *People* v. *Mackey*, 33 Ill. 2d 436, 211 N.E. 2d 706 (1965), *People* v. *Washington*, 5 Ill. 2d 58, 124 N.E. 2d 890 (1955), *People* v. *Culbert*, 69 Ill. App. 2d 162, 215 N.E. 2d 470 (1966).

In *Washington* at page 63, the court said:

"It is contended, first, that since the record shows that defendant had consulted with his counsel, he must

be presumed to have been fully aware of the sentence he was likely to receive if he withdrew his plea of not guilty and entered one of guilty. As we see it, the fallacy of such an argument is that both the Criminal Code and Rule 27A place the duty of explaining on the court and do not permit indulgence in the presumption that counsel has already performed such function.

We see little or no merit to a contention that a defendant who enters a plea of guilty is chargeable with knowledge of matters de hors his own trial * * *. The very purpose of Rule 27A is to provide a form of procedure eliminating any doubt that a plea of guilty was made with full knowledge and understanding and to avoid the method of procedure where a defendant's knowledge and understanding were held to rest solely on implications arising from the common-law record. To this end the rule has carefully spelled out the information which must be conveyed to a defendant to give him full knowledge of the charge against him, and leaves little, if any, room for indulgence in presumptions."

Clearly, the trial court failed in its duty.

On appeal to the Appellate Court the defendant contended, among other things, that the trial court accepted the plea of guilty without adequately explaining to him the nature of the charge and the consequences thereof. In affirming the conviction, the court held there was no reversible error in the admonishment of the trial court

In two recent cases this Court reversed convictions based upon pleas of guilty and in its opinions set forth standards for the acceptance of guilty pleas in both the federal and state courts.

In *McCarthy* v. *United States,* 394 U.S. 459, 89 S. Ct. 1166, 22 L. ed. 2d 418, which was decided on April 2,

1969, the court was called upon to construe Rule 11 of the Federal Rules of Criminal Procedure. It provides that a judge shall not accept a plea of guilty "without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea" and "unless it is satisfied that there is a factual basis for the plea." The Rule is similar to the Illinois Statute and Supreme Court Rule. The court held that the Rule had not been complied with when the trial judge did not personally inquire whether the defendant understood the nature of the charge.

In its opinion, the court said:

> "A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' (*Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. ed. 1461 (1938).) Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." 89 S. Ct. 1166, 1171.

In holding Rule 11 can not be complied with unless the judge personally inquires whether the defendant understands the charge, the court said:

> "To the extent that the district judge thus exposes the defendant's state of mind on the record through

personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary. Both of these goals are undermined in proportion to the degree the district judge resorts to 'assumptions' not based upon recorded responses to his inquiries."

Having found non-compliance with Rule 11 the court remanded the case for a hearing at which the defendant could plead anew. The court noted that although some courts have held non-compliance with the rule requires, at most, remand for a hearing on the issue of the voluntariness of the plea, Rule 11 was designed for the very purpose of eliminating any necessity of resort to a later fact finding hearing. Furthermore, at such a hearing it would be very difficult for a defendant to substantiate an allegation that his original plea was involuntary and without an understanding of the charge. The court concluded "there is not adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him."

In closing, Chief Justice Earl Warren, who delivered the opinion of the court, said, "It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understood the action they are taking." 89 S. Ct. 1166, 1174.

In *Boykin* v. *Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. ed. 2d 274, which was decided on June 2, 1969, the court held that the Due Process Clause of the 14th Amend-

ment required the outright reversal of the conviction because "the record (is) inadequate to show that petitioner * * * intelligently and knowingly plead guilty." The court extended *McCarthy* to a State court but based its ruling on constitutional grounds.

In reversing the conviction the court reiterated that a plea of guilty constitutes a waiver of the privilege of self-incrimination, the right to trial by jury, and the right to confront one's accusers. Moreover, a waiver of these federal rights cannot be presumed from a silent record. The court added:

> "'What is at stake for an accused facing death or imprisonment demands utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences. When the judge discharges that function he leaves a record adequate for any review that may be later sought * * *) and forestalls the spin-off of collateral proceedings that seek to probe murky memories.'" 89 S. Ct. 1709, 1712.

In a concluding footnote (7), the court said:

> "'If these convictions are to be insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include, inter alia, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged, and the permissible range of sentences.'" 89 S. Ct. 1709, 1713.

In the instant case, the explanation of the trial judge almost parallels that in *McCarthy*. See Appendix A, 89 S. Ct. 1166, 1174. Certainly, the explanation was as un-

satisfactory as in *McCarthy* and less than that required by the Supreme Court of Illinois in *Washington*. For this important reason alone, the judgment must be vacated.

Clearly, the plea of guilty was not voluntary. It is reversible error.

It is submitted that this court should inform the State courts that care must be taken in the acceptance of pleas of guilty, and then only after proper admonishment, in order that the record imports a voluntary plea and diminishes the need for post conviction remedies.

Again, there was a denial of due process of law.

4. The procedure followed in the probation report and hearing deprived the petitioner of due process of law.

The petitioner entered a plea of guilty to the offense of aggravated kidnaping on December 12, 1967. As heretofore shown, the trial court did not fully explain the nature of the charge and the consequences thereof. However, the plea was accepted by the court. He asked leave to file a petition for release on probation. He filed his petition on December 18, 1967. It was referred to the probation officer to investigate and make his report. In his report filed on January 31, 1968, the probation officer indicated that the petitioner had been arrested for the offenses of minor drinking, disorderly conduct and fleeing to avoid arrest. (A. 11.)

All the information in the probation report appears to have been received from the petitioner. (A. 10, 11.) Apparently no other persons were contacted or interviewed to determine whether or not the petitioner was a fit person for probation. Certainly his parents could have been interviewed and his former employers could have

been checked. The failure of the probation officer to perform his duties in an adequate manner deprived the petitioner of a fair hearing on his petition for release on probation.

At the hearing the State introduced four photographs and the report of a doctor. The State's Attorney also made a statement in which he indicated that the defendants had been arrested for a total of 16 offenses prior to the date of the offense. He indicated that Carter had been arrested for 7 minor offenses. The trial court denied probation after his counsel, Philip A. Nicolosi, stated he did not wish to argue the matter, but wanted to move on to aggravation and mitigation.

It is apparent that the trial court made its decision to deny probation on the basis of the offense committed, but also based its decision on the prior record of arrests rather than convictions. To allow the court to make a decision on whether or not the petitioner should receive probation on the partial basis of arrests rather than convictions was improper.

The petitioner was deprived of his liberty without due process of law. (*People* v. *Crews,* 38 Ill. 2d 331 (1967), *People* v. *Riley*, 376 Ill. 364 (1941), *People* v. *Grigsby,* 75 Ill. App. 2d 184, 220 N.E. 2d 498 (1966). It is reversible error.

Again, there was a denial of due process of law.

5. The procedure followed at the hearing in aggravation and mitigation of the offense deprived the petitioner of due process of law.

After probation was denied, the trial court proceeded to hear and receive evidence in aggravation and mitiga-

tion of the offense. (A. 35.) The court still had the probation report before it. It showed prior arrests and not convictions of the defendant. (A. 10.) He testified in his own behalf in an attempt to mitigate the offense. (A. 35.) Inasmuch as the court had the probation report before it, and since the court did not state that it was not considering the arrests, it must be assumed that the arrests were considered by the court in imposing sentence.

Furthermore, due to the youth of the petitioner, some of the arrests (and if convictions are assumed since not challenged by his counsel) may have been juvenile matters. Some cases have held that it is error to consider the record of a juvenile (*People* v. *Crable*, 80 Ill. App. 2d 243, 225 N.E. 2d 76 (1967), *People* v. *Grigsby*, 75 Ill. App. 2d 184, 220 N.E. 2d 498 (1966)), although the new Juvenile Court Act apparently disregards the prior interpretations when a juvenile has been declared a delinquent, and allows the court to examine the record of disposition or the evidence. See Section 2-9 (2) of the Juvenile Court Act (Ill. Rev. Stat. 1967, Chap. 37, Par. 702-9 (2)).

The probation report was not verified by any court records, and it was not affirmatively shown that the petitioner had been declared a delinquent. For the court to consider arrests rather than convictions was highly prejudicial to the petitioner. It is reversible error. *People* v. *Crews*, 38 Ill. 2d 331 (1967), *People* v. *Riley*, 376 Ill. 364 (1941).

The court below should have reversed the sentence and remanded the cause for a proper hearing in aggravation and mitigation of the offense.

Again, there was a denial of due process of law.

6. The punishment imposed indicates a lack of discretion by the trial court.

Following the hearing in aggravation and mitigation of the offense, the petitioner was sentenced to the Illinois State Penitentiary for a term of not less than 10 years nor more than 25 years. (A. 20.) His codefendants received the identical sentence at the same time. It can readily be seen that the trial court did not exercise discretion in determining the punishment for each defendant. Each had participated differently in the offense. Each also had an individual background.

The Criminal Code of 1961 (Ill. Rev. Stat. 1967, Chap. 38, Sec. 1-2) provides that the provisions of the Code shall be construed in accordance with the general purposes which are to forbid and prevent the commission of offenses, prescribe penalties which are proportionate to the seriousness of the offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders, and which prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.

The Code also provides for a hearing in aggravation and mitigation of the offense, as follows:

> "For the purpose of determining sentence to be imposed, the court shall, after conviction, consider the evidence, if any, received upon the trial and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation and criminal record of the offender and may consider such evidence in aggravation or mitigation of the offense."
>
> Ill. Rev. Stat. 1967, Chap. 38, Sec. 1-7 (g).

To state that no two individuals are alike is superfluous. The backgrounds of the individuals were different, their

participation in the offense was different, and their possibilities for rehabilitation were different. The trial court did not follow the statute which provides that differences in rehabilitation possibilities exist among individual offenders. To sentence each of the defendants to the same term was arbitrary and oppressive. It indicates a lack of discretion by the court. It is reversible error.

The court below should have reversed the sentence and remanded the cause for the purpose of determining the proper sentence.

Again, there was a denial of due process of law.

7. The sentence is excessive and constitutes cruel and unusual punishment.

On appeal, the reviewing court may reduce the punishment imposed by the trial court. (Illinois Supreme Court Rule 615 (b) (4)).

In interpreting the power, the court in *People* v. *Davidovic*, 68 Ill. App. 2d 216, 220, 215 N.E. 2d 474 (1966), said:

> "We adopt the principles set forth in *People* v. *Valentine*, * * * wherein the court said: 'We believe that the power to reduce sentences should be used with caution and that a sentence imposed by the trial judge, who sees the defendant and is in a far better position to appraise him and to evaluate the likelihood of his rehabilitation than a reviewing court should not be reduced unless there are substantial reasons for doing so. The penalty decided upon by the trial court, if within the statutory limits, should not be changed merely because of judicial clemency or just because the reviewing court would have imposed a different one if it had been in the trial court's position.'"

It is apparent that the petitioner appeared before the trial court only briefly to enter a plea of guilty and for a hearing on probation and in aggravation and mitigation of the offense. Although the cases indicate that the trial judge is in a better position to impose sentence, it would seem that a reviewing court, except for actually seeing the defendant, is in the same position as the trial court to appraise the likelihood of the rehabilitation of the petitioner. See Halperin, Appellate Review of Sentence in Illinois—Reality or Illusion, 55 Ill. B. J. 300, 308 (1966).

The record indicates that there were substantial reasons for reducing the punishment imposed by the trial court. As shown by the evidence at the hearing in aggravation and mitigation, Carter was 20 years of age, and has gone through his sophomore year at Boylan High School. He had been employed at several places after leaving school. He had no prior felony record. (A. 35.) He testified, as his probation report indicated, that he had been arrested on 7 occasions for minor drinking, disorderly conduct and fleeing to avoid arrest.

He testified that he was not present when the two girls were picked up. He arrived at the apartment with another defendant and about five fellows and a couple of girls were there. The girls decided that there were too many fellows there so they left. When he came from the apartment, the girl was already in the car. She was taken to the country against her wishes. During the day he had consumed a couple of six packs and a pint and a half of whiskey.

He testified that there never was any conversation to do great bodily violence to the girl. It was their intent

to bring her home when they were arrested. He had sexual intercourse with the girl.

In conclusion, he testified that he did wrong and was sorry. He asked the court to be merciful so that he could be rehabilitated. His parents were in the courtroom and had visited him in the jail.

The State's Attorney only asked the petitioner if he had taken an intoxication test and if he knew the results.

The State's Attorney also asked a probation officer, Paul Pirrello, who was a Captain in the Rockford Police Department at the time of the arrests, whether the boys were intoxicated. He stated that in his opinion they had been drinking but were not intoxicated. He ordered a test made of Carter because he showed the most evidence of drinking, but he could not remember what the test showed.

From the evidence at the hearing in aggravation and mitigation, it can readily be seen that the petitioner was young and had a family that was interested in his welfare. Although he had been arrested for several minor offenses, he had no prior felony record. He indicated his remorse for the offense committed and his desire for rehabilitation. His participation in the offense was undoubtedly due to excessive drinking, which does not excuse his conduct, but indicates the reason back of his acts. His behavior was the result of spontaneous mob action, rather than premeditated individual conduct. Although his conduct may have been reprehensible, he is not beyond rehabilitation.

The American Bar Association Project on Minimum Standards for Criminal Justice has published a work on Standards Relating to Sentencing Alternatives and Pro-

cedure. The Advisory Committee on Sentencing and Review, of which Simeon E. Sobeloff, a distinguished Judge of the United States Court of Appeals for the Fourth Circuit, is Chairman, states in this work that "the maximum authorized prison term ought to be five years and only rarely ten." See ABA Project on Minimum Standards for Criminal Justice: Standards Relating to Sentencing Alternatives and Procedures, Sec. 2.1 (1967).

Clearly, a sentence of 10 to 25 years in this case was excessive. A lower minimum sentence would allow the petitioner upon his first entry into a penal institution to have some hope that he would be eligible for release on parole within a reasonable time. A longer sentence may result in molding him into a hardened criminal, whereas a shorter time would provide for his rehabilitation and return to society. The Parole Board should have an opportunity to determine whether rehabilitation has occurred and the defendant returned to society after a minimum sentence has been served. A sentence of a minimum of two to three years would provide the petitioner with hope and the possibility of parole, and also serve as punishment while rehabilitation is hopefully occurring.

It is submitted that the court below should have reduced the punishment imposed by the trial court to a term more commensurate with the nature of the offense and the individual defendant combined with flexibility for the Parole Board. See James C. Craven, Sentencing, U. Ill. L. F. 523 (1966).

The court below had the power to do complete justice. In all justice and fairness, if the judgment of conviction and sentence was not reversed, it should have reduced the punishment imposed by the trial court.

The 8th Amendment to the Constitution of the United States expresses the revulsion of civilized man against "cruel and unusual punishments." New and enlightened treatment of accused persons is indeed needed. This age of enlightenment cannot tolerate such severe punishment. The court should point the way.

Again, there was a denial of due process of law.

Conclusion.

This case involves substantial federal questions.

There has been a substantial denial of the constitutional rights of the petitioner. He did not have a fair trial. It is the greatest human right that an accused has, Illinois has deprived him of his liberty without due process of law in violation of the Constitution of the United States and of the State of Illinois. It has also denied him the equal protection of the laws.

In order that justice may be done, this court should take jurisdiction. It is the last hope of the petitioner.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN R. SNIVELY,

Counsel for Petitioner.

APPENDIX

A.

Constitutions

Constitution of the United States

Articles in Addition to, and Amendment of, the Constitution.

Amendment V

* * * nor shall (any person) be compelled, in any criminal case, to be a witness against himself, * * *

Amendment VI

In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

Section 1. * * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Illinois

Adopted in Convention at Springfield, May 13, 1870. Ratified by the People, July 2, 1870. In force August 8, 1870.

Article II

Bill of Rights.

Section 2. No person shall be deprived of life, liberty or property, without due process of law.

Section 9. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

Section 10. No person shall be compelled in any criminal case to give evidence against himself, * * *

B.

Statutes

An Act relating to criminal law and to repeal acts and parts of acts herein named. Approved July 28, 1961. L. 1961, p. 1982. Effective January 1, 1962.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 10-1. Kidnaping.) (a) Kidnaping occurs when a person knowingly:

(1) And secretly confines another against his will, or

(2) By force or threat of imminent force carries another from one place to another with intent secretly to confine him against his will, or

(3) By deceit or enticement induces another to go from one place to another with intent secretly to confine him against his will.

(b) Confinement of a child under the age of 13 years is against his will within the meaning of this Section if such confinement is without the consent of his parent or legal guardian.

(c) Penalty.

A person convicted of kidnaping shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years.

Section 10-2 Aggravated Kidnaping.) (a) A kidnaper within the definition of Section 10-1 (a) is guilty of the offense of aggravated kidnaping when he:

(1) Kidnaps for the purpose of obtaining ransom, money benefit, or other valuable thing or concession from the person, or from any other person, or

(2) Takes as his victim a child under the age of 13 years, or

(3) Inflicts great bodily harm or commits another felony upon his victim, or

(4) Wears a hood, robe or mask or conceals his identity.

(b) Penalty.

(1) A person convicted of aggravated kidnaping for ransom shall be punished by death or imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 2 years. If the accused is found guilty by a jury, a sentence of death shall not be imposed by the court unless the jury's verdict so provides in accordance with Section 1-7 (c) (1) of this Code.

(2) A person convicted of aggravated kidnaping other than for ransom shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than 2 years. As amended by act approved Sept. 1, 1967. L. 1967, p. ....., H.B. No. 1648.

Ill. Rev. Stat. 1967, Chap. 38, Pars. 10-1, 10-2.

An Act relating to criminal law and procedures and to repeal acts and parts of acts herein named. Approved Aug. 14, 1963. L. 1963, p. 2836. Effective Jan. 1, 1964.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 111-3. Form of Charge.) (a) A charge shall be in writing and allege the commission of an offense by:

(1) Stating the name of the offense;

(2) Citing the statutory provision alleged to have been violated;

(3) Setting forth the nature and elements of the offense charged;

(4) Stating the date and county of the offense as definitely as can be done; and

(5) Stating the name of the accused, if known, and if not known, designate the accused by any name or description by which he can be identified with reasonable certainty.

(6) An indictment shall be signed by the foreman of the Grand Jury and an information shall be signed by the State's Attorney and sworn to by him or another. A complaint shall be sworn to and signed by the complainant.

Ill. Rev. Stat. 1967, Chap. 38, Sec. 111-3.

Section 113-4. Plea.) (a) When called upon to plead at arraignment the defendant shall be furnished with a copy of the charge and shall plead guilty or not guilty.

(b) If the defendant stands mute a plea of not guilty shall be entered for him and the trial shall proceed on such plea.

(c) If the defendant pleads guilty such plea shall not be accepted until the court shall have fully explained to the

defendant the consequences of such plea and the maximum penalty provided by law for the offense which may be imposed by the court. After such explanation if the defendant understandingly persists in his plea it shall be accepted by the court and recorded.

Ill. Rev. Stat. 1967, Chap. 38, Sec. 113-4.

Section 115-2. Pleas of Guilty.) (a) Before or during trial a plea of guilty may be accepted when:

(1) The defendant enters a plea of guilty in open court;

(2) The court has informed the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea.

(b) Upon acceptance of a plea of guilty the court may hear evidence of the charge."

Ill. Rev. Stat. 1967, Chap. 38, Sec. 115-2.

Section 117-1. Admission to Probation.) (a) A person who has been found guilty of any offense except a capital offense, the sale of narcotics or rape may be admitted to probation when it appears that:

(1) The defendant is not likely to commit another offense;

(2) The public interest does not require that the defendant receive the penalty provided for the offense; and

(3) The rehabilitation of the defendant does not require that he receive the penalty provided for the offense.

(b) The term of probation may be for any period not less than 6 months and not to exceed 5 years. The court may for good cause extend the period of probation for not more than an additional 2 years.

(c) A person admitted to probation shall remain subject to the jurisdiction of the court.

(d) The judgment of guilty entered prior to the admission of defendant to probation shall be a final judgment subject to review under Article 121 of this Code.

Ill. Rev. Stat. 1967, Chap. 38, Sec. 117-1.

C.

Rules

Illinois Supreme Court Rules.

Article IV. Rules on Criminal Proceedings in the Trial Court

401. (Supreme Court Rule 401.) Waiver of Indictment; Procedure on Plea or Waiver.

(a) Waiver of Indictment. When an offense that, under the constitution of this State, must be prosecuted by indictment is prosecuted by information or complaint rather than indictment, the State may file an information or complaint with clerk of the court. Thereafter the accused shall be brought into open court. After he has been advised of the nature of the charge and of his rights as hereinafter set forth, if he in open court waives prosecution by indictment, proceedings shall follow in accordance with the statutory requirements of proceedings under an indictment. If the accused does not waive prosecution by indictment, the court shall order the information or complaint stricken without prejudice to the right of the State to proceed by indictment.

(b) Procedure on Plea or Waiver. The court shall not permit a plea of guilty or waiver of indictment or of counsel by any person accused of a crime for which, upon conviction, the punishment may be imprisonment in the penitentiary, unless the court finds from proceedings had in open

court at the time waiver is sought to be made or plea of guilty entered, or both, as the case may be, that the accused understands he has a right to be held to answer for the offense on indictment by a grand jury and has understandingly waived that right and consented to his prosecution by information, that he understands the nature of the charge against him, and the consequences thereof if found guilty, and understands he has a right to counsel, and understandingly waives that right. The inquiries of the court, and the answers of the accused to determine whether he understands his rights to be indicted by a grand jury and to be represented by counsel and comprehends the nature of the crime with which he is charged and the punishment thereof fixed by law, shall be taken and transcribed and filed in the case. The transcript, when filed, becomes a part of the common-law record in the case.

(c) Persons Under 18. In no case shall a plea of guilty or a waiver of indictment or trial by jury be accepted from a person under the age of 18 years, unless he is represented by counsel in open court.

Ill. Rev. Stat. 1967, Chap. 110A, Sec. 401.

Article VI. Criminal Appeals Rules

615. (Supreme Court Rule 615). The Cause on Appeal

(a) Insubstantial and Substantial Errors on Appeal. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.

(b) Powers of the Reviewing Court. On appeal the reviewing court may:

(1) reverse, affirm, or modify the judgment or order from which the appeal is taken;

(2) set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken;

(3) reduce the degree of the offense of which the appellant was convicted;

(4) reduce the punishment imposed by the trial court; or

(5) order a new trial.

Ill. Rev. Stat. 1967, Chap. 110A, Sec. 615.

D.

Opinion of the Appellate Court of Illinois
Second Judicial District
March 28, 1969
107 Ill. App. 2d 474, 246 N.E. 2d 320

Mr. Justice Seidenfeld delivered the opinion of the Court:

Defendant appeals from judgment of conviction of Aggravated Kidnapping, entered upon his plea of guilty, and sentence of 10 to 25 years in the penitentiary.

Together with three other persons, defendant had been indicted for the offenses of rape and aggravated kidnapping in two counts. On arraignment, pleas of not guilty were entered to both counts. Thereafter, the plea of not guilty was withdrawn as to the second count of the indictment charging aggravated kidnapping, and a plea of guilty was entered in this count. (The first count charging rape was subsequently nolle prossed.)

Defendant contends that the trial court accepted the plea of guilty without adequately explaining to the defendant the nature of the charge and the consequences thereof; that the court improperly considered arrests rather than convictions in the hearing on probation and in aggravation and mitigation; that in giving identical sentences to all defendants the court did not exercise its discretion; finally, that the punishment was excessive.

Defendant contends that the admonishment by the court failed to comply with the requirements set forth in *Ill. Rev. Stat.* 1967, Chap. 38, Sec. 113-4 (c) and Supreme Court Rule 401 (b) (*Ill. Rev. Stat.* 1967, Chap. 110A, Sec. 401). The pertinent part of the statute requires the court; before ac-

cepting the plea of guilty, to "have fully explained to the defendant the consequences of such plea and the maximum penalty provided by law * * *". The implementing Rule provides, in pertinent part, that the court shall not permit a plea of guilty to a felony "unless the court finds from the proceedings had in open court at the time * * * plea of guilty entered * * * that the accused understands * * * the nature of the charge against him, and the consequences thereof * * *".

Prior to the admonishment, the record discloses that the defendants' attorney had advised the court that the defendants wished to plead to the second count of the indictment. To which the court said, "aggravated kidnapping?", and counsel answered, "Yes".

The court then advised the defendant of the right to trial by jury, the right to confront witnesses, and the right to trial before the judge alone. The court continued:

> "And on your plea of guilty the Court might sentence you to the penitentiary for a period of years not less than one or a maximum number of years to be fixed by the Court, or any combination of years not less than the minimum set by the Court and the maximum set by the Court, within the one to the indeterminate number of years fixed by the Court".

Before accepting the plea from the defendant, the court inquired, "Is there anything about it you don't understand?" To which the defendant answered, "No, sir".

When the petition for probation was filed a colloquy occurred in which the court raised the question of whether aggravated kidnapping was an offense upon which probation could be granted, and counsel advised that it was but that rape was not.

We find no reversible error in the court's admonishment of the defendant.

We note that the defendant does not claim he did not understand the nature of the charge to which he pleaded guilty, but takes the position that it is error for the court not to have more fully explained the offense charged.

However, the defendant was advised of the "nature of the charge" by the court's statement that the plea was to "aggravated kidnapping". The Rule does not require that the court state all of the acts which constitute the offense, but that it give its "essence, general character, kind or sort". *People* v. *Harden,* 78 Ill. App. 2d 431, 444 (1966) (adopted by reference in *The People* v. *Harden,* 38 Ill. 2d 559, 563 (1967)). See also, *The People* v. *Doyle,* 20 Ill. 2d 163, 166-7 (1960).

On this record we distinguish *The People* v. *Washington,* 5 Ill. 2d 58, 61 (1955), and *People* v. *Culbert,* 69 Ill. App. 2d 162, 166 (1966), both of which have been cited by the defendant. In *Washington,* the nature of the crime was not mentioned and the trial court made reference only to certain counts of the indictment. In *Culbert,* there was no statement of the offense on acceptance of the plea of guilty.

The defendant was also adequately advised of the consequences of his plea. It is conceded that the trial court was in error in stating that the minimum term was one year rather than two years. However, the trial court correctly advised the defendant as to the maximum penalty provided by law in accordance with Sec. 113-4 of Chap. 38 (supra) and having been given a minimum sentence of ten years, the defendant was not prejudiced

by the misstatement of the minimum term. *The People* v. *Kontopoulos*, 26 Ill. 2d 388, 390, 391 (1962).

Defendant claims reversible error in the procedure followed by the trial court in the hearing on the motion for probation and in aggravation and mitigation. It is argued that the court made its decision to deny probation partially on the basis of prior arrests rather than upon convictions and, likewise, was thereby improperly influenced in determining the sentence.

A probation report had been introduced which referred to the fact that defendant had been "arrested" on seven previous occasions for misdemeanor offenses. The State's Attorney referred to arrests of the defendant without objection by hired defense counsel. Defense counsel also referred to arrests in his questioning of defendants as to their prior criminal records. The reports and references as to a co-defendant, who was on probation for armed robbery, were likewise to arrests without mention of conviction.

It seems clear in the context of the entire record that all of the parties were intending to refer to convictions rather than arrests. The trial judge, at the time he denied probation and also at the time of the passing sentence, made no reference to the previous record of the defendants, so that we cannot speculate as to what part this played in the court's decision, but we can conceive of no prejudice to the defendant in view of the vicious nature of the crime and the substantial basis for a severe sentence. While we do not approve of the procedure, we find no prejudice to the defendant sufficient to constitute reversible error. See *The People* v. *Riley*, 376 Ill. 364, 372, 373 (1941); *The People* v. *Adkins*, 41 Ill. 2d 297, 299-301 (1968).

We also find that the remaining contentions of sentencing error are not substantial. The whole record supports the proper exercise of discretion in the trial court in sentencing each of the defendants to a similar term. There was a marked similarity in the background of each of the defendants and in the circumstances of their participation in the offense.

Finally, the sentence was not manifestly excessive, in view of the violent nature of the crime. The complaining witness was forcibly taken out into the country where she was criminally assaulted by the four defendants. There was repeated natural and unnatural sexual acts committed over a period of approximately three hours. There was evidence of strong resistance by the complaining witness and evidence of bruises and scratches on a large part of her body, evidence that the hymen appeared lacerated and that there was blood present in the vagina.

There was no abuse of discretion in imposing sentence which would justify a reduction of sentence here under the guide lines set forth in *The People* v. *Taylor*, 33 Ill. 2d 417, 424 (1965).

We, therefore, affirm.

Affirmed.

MORAN, P. J. and ABRAHAMSON, J. concur.